The Future of Sports Merchandise Licensing

by

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Merchandising of sports properties has become big business in the United States. The American public's desire to associate themselves with their favorite sports teams and sports heroes has increased the revenue generated by the sale of t-shirts, caps, and numerous other products with team logos. The rapid and large increase in merchandise revenue creates problems in determining how the revenue should be distributed amongst the teams and raises questions as to whether the current system for licensing logos and distributing profits is the best system available.

Currently, the four major sports leagues—National Football League (NFL), Major League Baseball (MLB), National Basketball Association (NBA), and National Hockey League (NHL)—each license their individual team logos through a central licensing office and split the royalty revenue evenly among the teams, with a few minor exceptions. Is this the most effective system for merchandising team logos? For a number of teams, shared revenue, a portion of which is generated by the merchandise sales, can be the difference between survival and economic failure. The nature and success of sports leagues depends on the availability of competition between teams because it is the competition that cultivates fans and sells merchandise. Revenue sharing helps to guarantee this competition.

There are potential antitrust implications of joint merchandising agreements; sports leagues are an anomaly in the business world because they do not fit neatly into antitrust laws. The nature of sports leagues has troubled courts for a number of years, and the characterization of a sports league can be outcome determinative in antitrust litigation. Courts have rejected the theory that a sports league as a whole should be viewed as a single entity, stating that even though sports leagues possess some characteristics of a single entity, the competition between the teams adds a competitive dimension to the league, thereby preventing the league from being characterized as a true single entity.1

This Note will explore the current merchandise licensing practices of the four major sports leagues and the future of merchandise licensing. Part I discusses the nature of sports properties. Part II discusses current revenue sharing plans, the structure of sports leagues, and the pros and cons of revenue sharing. Part III discusses the antitrust laws and their application to sports leagues. The section addresses how

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1. See Los Angeles Memorial Coliseum Comm'n v. NFL, 726 F.2d 1381 (9th Cir. 1984).
and why the courts have treated baseball differently than the other sports. Part IV explores the possible future of merchandise licensing and the implications of Congressional involvement. The section examines the potentially disastrous outcome if joint agreements that vest the right to license in one central company in each league are no longer used and each team is left to license its own logo. This Note concludes that revenue sharing is an essential element of sports leagues and that a workable solution to the merchandising dilemma can be reached.

I

Sports Properties

Sports merchandise properties include all items on the market that contain team logos; the most successful are low-priced “impulse” products. The licensing of sports properties is a big business because fans want to identify with their favorite team or sports hero by wearing a t-shirt, cap, or other article containing the team logo.

Each sports team has a logo, consisting of a name, design, and color scheme that represents the team and is easily identifiable by the sports viewing public. The logo is a trademark and can be registered with the Patent and Trademark Office on the Principal Register as a mark for entertainment services in the form of professional sports games. Team logos are placed on merchandise to indicate sponsorship and authorization by the team represented by the logo. Each team owns the trademark rights in the logo, including the right to license the logo.

Theoretically, as a general business practice, each team would have the right to exploit its own logo by manufacturing and distributing merchandise carrying the logo, keeping the profits derived from the sale of such merchandise. However, since a team generally cannot or does not want to manufacture a wide variety of products, an


7. Id.

8. Dallas Cap, 327 N.E.2d at 249.
outside company must be granted a license to produce and sell the products.\footnote{Grimes & Battersby, supra note 2, at 436.}

The four major sports—football, baseball, basketball, and hockey—each pool their collective resources and have one arm of each league handle the licensing for all teams within the league. Each team authorizes its league’s licensing entity to act as its licensing agent.\footnote{Dallas Cap, 327 N.E.2d at 249.} There are, however, slight differences between the leagues in the way the revenue is split and whether the licensing arm has the exclusive right to handle all licensing matters or whether the teams may also market merchandise on their own.

The central licensing agents, Major League Baseball Properties (MLBP), National Football League Properties (NFLP), National Basketball Association Properties (NBAP), and National Hockey League Properties (NHLP) operate through a licensing program which selects companies to manufacture merchandise with the team logos and arranges for distribution and sale of the products.\footnote{In addition, the licensing agent arranges for use of the logos by advertising agencies in conjunction with approved promotions. New Jersey Giants, Inc., 637 F. Supp. at 511. For example, logos are often used to help promote non-sports products, such as the use of Michael Jordan wearing his Chicago Bulls uniform on a McDonalds drinking cup.} Rather than requiring each team to handle its own licensing, this joint approach allows the central licensing agent to better control the quality of the merchandise by approving and supervising “[t]he conception, design, color combinations, production and distribution of all merchandise licensed to bear the marks, . . . .”\footnote{Id.} This produces a quality product that favorably represents the league as a whole.

After manufacturing the merchandise, the licensee distributes the merchandise through a number of different national and international retail distribution channels.\footnote{Sales of licensed team merchandise to European retailers has increased over the past few years, and the success can be partially attributed to the increase in television coverage of traditionally American sports. Sharon Tomkinson, Team Spirit; Team Licensed Products; SGB International: European Report, SPORTING GOODS BUSINESS, Sept. 1993, at 8A1.} Mail order, retail department stores, and sporting goods stores are a few examples of such distribution channels.\footnote{New Jersey Giants, Inc., 637 F. Supp. at 511.} These retail entities in turn sell the merchandise to the general public.

The sale of licensed logo merchandise, such as caps, uniforms, and jackets, is an important aspect of the sports business, and is responsible for a dramatic increase in league revenues, including some
individual team revenues.\textsuperscript{15} For example, the revenue generated by a baseball team from licensed merchandise grew at a rate of 11.7\% per year from 1971 to 1992.\textsuperscript{16} The rise has been just as dramatic in other sports.\textsuperscript{17} Moreover, despite shortened seasons in baseball and hockey in 1994, sports merchandise sales in the United States and Canada increased by 5\% in 1994, due mainly to the first-half sales of baseball and hockey merchandise and strong sales of NFL, NBA, and college merchandise.\textsuperscript{18} Income for the leagues and the teams is derived from the payment of royalties stemming from retail sales of the logo-bearing merchandise.\textsuperscript{19} Although the royalty rates collected by the leagues differ, the money generated from royalty revenues is a source of shared revenues for each league.

II

Revenue Sharing

Revenue sharing is the practice of pooling together revenue from agreed-upon sources and then distributing it, generally evenly, to individual teams.\textsuperscript{20} The practice stems from the need to keep smaller market teams, who do not have the resources to generate as much revenue as large market teams, competitive and viable.\textsuperscript{21} The success of teams in larger markets increases the revenue pool and allows those teams in smaller markets access to more revenue than they could generate independently.\textsuperscript{22} For example, in 1991, the Seattle Mariners received approximately 55.5\% of their near-$36 million total revenues from shared revenue sources.\textsuperscript{23} This increased revenue is used by the


\textsuperscript{17} In the NFL, revenues grew from $3 billion in 1993 to $3.15 billion in 1994. In the NBA, the revenues increased from $2.2 billion in 1993 to $2.8 billion in 1994. Jeff Jensen, Sports Marketing; NBA Lockout Slows Licensing Juggernaut, Advertising Age, July 17, 1995, at 6.


\textsuperscript{22} Id.

\textsuperscript{23} Zimbalist, supra note 16, at 59.
smaller market teams to field teams that are able to compete more effectively with the larger market teams.\textsuperscript{24} The revenue from shared sources stems from the strength of joint agreements. A joint agreement consists of the joining of all the teams in a league for the purpose of negotiating as a single entity.\textsuperscript{25} This practice produces more bargaining power for the league and allows for the negotiation of stronger contracts.\textsuperscript{26} The pooling of revenues has generated controversy over the legality of joint agreements and whether they really are necessary to the survival of sports leagues. Many people within the industry believe that joint agreements are necessary in order to maintain competitive balance on the field as well as financial stability for each franchise.\textsuperscript{27} "'One of the key things that a sports league needs'... 'is unity of purpose. It needs harmony... When you have unity and harmony and can move basically as one, you can have a successful sports league.'"\textsuperscript{28} Others, however, argue that sports franchises are no different than any other form of business, and since the United States operates as a market economy, a team that cannot survive on its own revenue should cease to operate.\textsuperscript{29} This view is overly simplistic, however, because the inherent characteristics of a sports league are different from other forms of business and competition operates differently in sports than in the traditional business arena.

A. League Structure

Sports leagues are similar to other businesses in that each team in a league is owned and operated independently of the other teams in the league, and all profits, losses, and capital expenditures are the responsibility of each individual owner.\textsuperscript{30} However, sports leagues are different from other businesses in that while they contain separate franchises, the teams share some of the revenues.\textsuperscript{31} Moreover, each team is directly interested in the survival of other teams in the league because economic survival of teams will ensure competition on the field, which is directly relevant to the survival of the league as a

\textsuperscript{24} Van Glish, \textit{supra} note 21.
\textsuperscript{25} \textit{Chicago Prof. Sports Ltd. Partnership}, 754 F. Supp. at 1340-41.
\textsuperscript{26} Van Glish, \textit{supra} note 21, at 98.
\textsuperscript{27} GERALD W. SCULLY, \textit{THE BUSINESS OF MAJOR LEAGUE BASEBALL} 13 (1989).
\textsuperscript{30} Van Glish, \textit{supra} note 21, at 89.
\textsuperscript{31} \textit{Id.}
whole. If strong competition among the teams ceases to exist, fans will lose interest and the leagues will not survive.

To ensure a somewhat even playing field and to produce competition worth watching, the teams must agree on certain aspects of the game which will be followed by all teams. For example, agreement as to the scoring and playing rules, how many players each team will be allowed to have, and the type of equipment that can be used must be made by all teams in the league. In addition to these basic agreements, arrangements have been established to allow a league to operate as a single entity in which the profits generated are split equally among all the teams. Such formal agreements give sports leagues the characteristics of a cartel.

Even though the teams join together for some decisions and agreements, they compete directly with one another for media attention, coaching staff, front-office personnel, and players. Each team makes independent management decisions in direct competition with other teams to develop the best team on the playing field. The league’s survival depends on the competition generated amongst the teams on the playing field, and the relative strength of each team on the playing field is determined by each owner's ability to generate and use the financial resources required to support a winning team. The creativity and entrepreneurship of individual team management will, to some extent, determine whether each team survives or collapses.

B. Current Revenue Sharing Plans

Each league and its members determine the manner in which leagues share revenue. The extent to which teams share revenues, however, differs substantially between the leagues. There is a significant difference between football, which has the most extensive revenue sharing system, and hockey, which currently has the least extensive revenue sharing system. Although both leagues share merchandise royalty revenue equally among the teams, there are slight differences in the manner in which each league allows its individual

33. SCULLY, supra note 27, at 13.
35. Id. A cartel is "[a] combination of producers of any product joined together to control its production, sale, and price, so as to obtain a monopoly and restrict competition in any particular industry or commodity." BLACK'S LAW DICTIONARY 147 (6th ed. 1990).
37. Van Glish, supra note 21, at 89.
38. See SCULLY, supra note 27, at 75.
teams to participate in the marketing of their own merchandise. As for other shared revenue sources, each league has developed its own approach.

1. National Football League (NFL)

The NFL currently has the most extensive revenue sharing plan of all the major sports leagues. Each team derives up to 95% of its revenue from shared sources. Revenue derived from merchandising properties is shared evenly among the thirty teams. Because the teams share revenue derived from the sale of merchandise, a "hot" team does not have a significant economic advantage, in terms of merchandising revenue, over other teams. For example, the popularity of the Dallas Cowboys accounts for approximately 30% of the revenue derived from NFL merchandise sales, which totaled approximately $3 billion in 1994. However, the Cowboys do not receive 30% of the total royalty revenue; they receive only 1/30th of the total royalty revenue, which is the same percentage that a team whose merchandise does not sell well receives. Under the current merchandise licensing system, there is no economic incentive (in terms of merchandizing revenue) to field a winning team since a winning team will receive the same amount of merchandizing money as a losing team.

In terms of television revenues, each team receives 1/30th of the revenue generated from the licensing of network broadcast rights. All television rights deals are negotiated collectively, and each individual team is prohibited from negotiating its own television contracts.

40. Nick Cardofo, Patriots Are Scoring With Selling Points, BOSTON GLOBE, Aug. 30, 1994, at 62. In 1994, there were 28 teams in the league. However, 2 expansion teams have been added to the NFL league beginning in the 1995 season: the Carolina Panthers and the Jacksonville Jaguars. Sheldon Mickles, Expansion Teams Off to a Good Start, THE ADVOCATE, July 17, 1995, at 1D.
41. Id.
43. Licensing Letter, supra note 15.
44. See Cardofo, supra note 40, at 62. In 1994, the royalty revenue from each NFL team was approximately $3.5 million. Steve Zipay, Dallas Oilman's NFL Gusher, NEWS-DAY, Sept. 22, 1995, at A88.
with the exception of some pre-season games. Football differs from baseball and basketball in that football teams have no opportunity to derive additional revenue from local television contracts.

2. Major League Baseball (MLB)

While the income derived from revenue sharing sources in MLB is significantly less than the percentage of shared revenue in football, it is nevertheless substantial. In 1991, shared revenue income accounted for approximately 36.5% of an average American League team’s income and 34.9% of an average National League team’s income. The royalty revenue derived from merchandise licensing, minus MLBP’s management costs, is placed in a Major League Baseball general fund that the teams share equally. Individual teams, however, can supplement their merchandise revenue by selling game souvenirs, such as cracked bats and balls used in a game.

Revenues from licensing of national broadcasting rights are split evenly among the teams, but each team currently keeps revenues from the licensing of its local broadcasting rights, with the exception of a small amount from local pay-television and superstation receipts. MLB negotiates for nationally televised games as a single entity. However, each team is free to negotiate its own local contract. The league, however, regulates those games broadcast on superstations by imposing a tax on the broadcast rather than restricting the number of games that can be broadcast. MLB’s taxing of superstation broadcasts differs from regulation in the other leagues, to the extent that there is either a limit to the number of games that a team may place on local television or superstations, as in basketball, or the individual teams cannot negotiate their own local contracts, as in football. MLB’s regulation of superstation contracts increases the revenue an individual team may receive, but does not significantly diminish the shared revenue that a team whose market would not support a significant local contract may receive.

47. ZIMBALIST, supra note 16, at 59.
48. Id. at 58.
49. See id.
50. Superstations are defined as “independent, over-the-air television stations that broadcast in their local market areas and are also carried by cable systems to other parts of the country. WTBS in Atlanta, WGN TV in Chicago and WWOR in New York are all examples of superstations.” Chicago Prof. Sports Ltd. Partnership, 754 F. Supp. at 1338.
51. ZIMBALIST, supra note 16, at 150.
3. **National Hockey League (NHL)**

The NHL handles its merchandise licensing much like the other sports leagues in that the league has a licensing arm that licenses manufacturers to produce the merchandise with team logos for all twenty-six teams. A percentage of the royalty revenue generated from the sale of the licensed merchandise is split equally amongst the teams. The NHL differs from other sports leagues because it also allows individual teams to market team products which are sold at venues controlled by the individual team, such as concession stands in the arena, souvenir stores within a specified area, and mail order catalogs. A percentage of the royalty revenue derived from these sales is placed in the pool for redistribution and the team retains the rest. Since each team has a vested interest in its own marketing scheme, they have an incentive actively to market and promote their individual team.

A powerful team, however, may negotiate a contract in which it can market its merchandise in an area larger than other teams. For example, the Anaheim team owned by Disney is allowed to sell its own merchandise in any of over 200 world-wide Disney stores. Revenue derived from such sales is not subject to redistribution among the teams. Even though Disney was able to keep the additional revenue generated from sales of its team merchandise, Mighty Ducks merchandise licensed by the NHL still accounted for approximately 80% of royalty revenue at various times during the 1993-94 season.

4. **National Basketball Association (NBA)**

In the NBA, shared revenue can be the difference between making a profit or operating at a loss. It has been estimated that the revenue from shared sources keeps twenty of the twenty-seven NBA teams operating at a profit.


55. *Id.*

56. *See id.*


58. *See Norwood, supra note 54, at C6.*


60. *Chicago Prof Sports Ltd. Partnership, 754 F. Supp. at 1340.*

61. *Id.*
Merchandise revenue is split evenly amongst the teams.\textsuperscript{62} The league maintains control over each team’s trademarks and logos outside of each team’s own arena. Each team has very limited rights in terms of marketing merchandise with an NBA or team logo.\textsuperscript{63}

Teams at the top of their divisions generally have higher revenues than teams that are consistently at the bottom of the league.\textsuperscript{64} Generally, the disparity in team revenue affects the on-court competition. This disparity is enhanced by the fact that there is no sharing of gate receipts. Thus, a winning team generally has a higher number of fans attending the game, which increases its gate revenues and allows it to maintain a competitive team with better-than-average players.\textsuperscript{65}

The largest source of shared revenue comes from fees obtained from agreements with NBC and TNT for broadcasting rights.\textsuperscript{66} By pooling these rights, the teams do not compete in an area which they might otherwise need to compete.\textsuperscript{67} Broadcast revenues are split evenly. Each team contributes a certain number of games to a league pool which is then sold as part of a package to a television network.\textsuperscript{68} The league negotiates national network contracts, national cable contracts, and regional cable contracts.\textsuperscript{69} Each team, however, may individually negotiate the television broadcast of “up to half (41) its regular season games, home or away, over any commercial over-the-air television station other than a superstation located in its ‘home territory.’”\textsuperscript{70} In 1990, of the $8.5 million distributed to each team by the league, $6.8 million (80\%) was attributable to the revenue from national television contracts negotiated by the league.\textsuperscript{71}

The difference in the extent of revenue sharing has different effects on each league and creates different operating environments for management to work within. For example, with football’s extensive revenue sharing, 90-95\% of a team’s revenue comes from shared sources. Management is not as burdened with generating revenues with which to field a team. Rather, it is concerned with working

\textsuperscript{62} \textit{Id.}
\textsuperscript{63} \textit{Id.} at 1339.
\textsuperscript{64} \textit{Id.} at 1341.
\textsuperscript{65} \textit{See id.} at 1341-42.
\textsuperscript{66} \textit{Id.} at 1340.
\textsuperscript{67} \textit{Id.}
\textsuperscript{68} \textit{Id.}
\textsuperscript{69} \textit{Id.} at 1344.
\textsuperscript{70} \textit{Id.}
\textsuperscript{71} \textit{Id.} at 1340.
within the parameters of the salary cap while still fielding a winning team. With a team's economic survival not necessarily at stake, management can focus on fielding as competitive a team as possible, which in turn will increase the team's profits. In contrast, where only 15-50% of an NBA team's revenue is derived from shared sources, management must field a competitive team not only to win on the court, but also to generate fan attendance at games so as to increase the team's revenues and allow the franchise to remain economically viable.

C. Arguments for Revenue Sharing

Revenue sharing is an important component in the survival of each individual team as well as the league as a whole. The sharing of revenues is essentially a cross-subsidization. It will: (1) provide franchise stability, (2) ensure competition between the teams, (3) provide geographic balance, and (4) benefit the players.

Revenue sharing is important as a strong base for franchise stability; it provides a competitive as well as geographic balance within a league. Revenue sharing allows teams that are not at the peak of their game to remain financially stable enough to field a competitive team and survive. Congressional studies have shown that revenue sharing is an "effective means of preserving balanced competition within a sports league."

It has been argued that the only value derived from sports teams is the enjoyment gained from watching two teams involved in a competitive contest. However, if the teams are consistently uneven, that is, the teams in larger markets with more money are consistently the dominant teams, even the most loyal sports fan will begin to lose interest. Revenue sharing works toward the goal of ensuring that each franchise, regardless of the size of the market, has a chance to field a competitive team. For instance, in the NFL, revenue sharing has allowed teams from cities like Green Bay, Kansas City, and New Orle-

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72. In the NFL there is a maximum amount of money that each team can spend on player salaries. Vic Carucci, Reality of 'Cap-Matics', THE SPORTING NEWS, Mar. 28, 1994, Football at 32.
75. Id. at 61.
76. Id. at 62.
77. SCULLY, supra note 27, at 75.
78. Jacobs, supra note 32, at 33-34.
79. Rozelle Statement, supra note 74, at 61.
ans to field teams that are competitive with teams from Los Angeles, Chicago, and New York.  

Also, national geographic balance is furthered through revenue sharing. Without revenue sharing, smaller communities could not field teams, leaving teams only in big cities. In support of revenue sharing, George Halas stated in testimony to the House Judiciary Committee that "[t]he current league would not exist today without such practices."

Not only does revenue sharing benefit the teams, it also benefits the players. Revenue sharing ensures that small-market teams can effectively compete with large-market teams. Consequently, the number of franchises has increased over the years, thereby increasing the number of players that can play professional sports. Thus, revenue sharing has become "[t]he principle basis of the league's ability to offer comparable employment opportunities and economic rewards at each team location." Revenue sharing benefits all teams in a league, giving smaller teams the resources to remain in existence, and thereby increasing, or at least maintaining, the overall output of the league product.

D. Arguments Against Revenue Sharing

Revenue sharing is harmful because teams that are able to earn a profit subsidize the smaller teams who essentially get a free ride on the success of the larger market teams. Revenue sharing harms the league structure and individual teams because it: (1) reduces competition, (2) reduces incentives for the teams to earn a profit, (3) reduces player salaries, and (4) adversely affects league expansion.

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81. Rozelle Statement, supra note 74, at 61.
82. Id.
83. Id. at 62. George Halas was the Chairman of the Board and President of the Chicago Bears and head of the League Expansion Committee. See Antitrust Policy and Professional Sports: Overnight Hearings on H.R. 823, H.R. 3287, and H.R. 6467 Before the Subcomm. on Monopolies and Commercial Law of the House of Representatives Comm. on the Judiciary, 97th Cong., 1st and 2d Sess. 173 (1982); Harris, supra note 28, at 11.
84. Rozelle Statement, supra note 74, at 62.
85. Id.
86. Id.
Revenue sharing does not promote competition amongst the teams, rather it eliminates any economic incentive for a team to win.\textsuperscript{88} The incentive to win is lessened because, win or lose, a team will receive an equal fraction of the shared revenue.\textsuperscript{89} There is a fear that by taking away a team's incentive to obtain larger economic profits by winning, team management will become lax and the effort put into promoting a team will be minimal at best.\textsuperscript{90} If the promotion of teams ceases, fan interest and support is likely to decrease.\textsuperscript{91}

Revenue sharing may also reduce player salaries. Critics have argued that revenue sharing adversely affects player mobility because it removes all incentive for an owner to bid for a particular athlete's services.\textsuperscript{92} If an owner has no economic incentive to put together a winning team, the premier athletes will not be paid their true market value.

Expansion may also be adversely affected by revenue sharing. Existing teams will not want to allow more teams into the league because more teams effectively cut down each team's revenue percentage.\textsuperscript{93} Television revenue for individual football teams will decrease in the 1995 season because there are two new teams in the league. Therefore, each team will receive 1/30th of the revenue rather than the 1/28th received in 1994.

The joint agreements that serve as the basis for revenue sharing raise a number of antitrust questions. Opponents of revenue sharing believe that joint agreements are anti-competitive and should be con-

\begin{itemize}
  \item \textsuperscript{88} 2 Inquiry Into Professional Sports: Hearings Before the House Select Comm. on Professional Sports, 94th Cong., 2d Sess. 403 (1976) (statement of Edmund G. Fitzgerald, owner of Milwaukee Brewers) [hereinafter Fitzgerald statement].
  \item \textsuperscript{89} Garvey Statement, supra note 45, at 36.
  \item \textsuperscript{91} Fitzgerald Statement, supra note 88, at 105.
  \item \textsuperscript{92} Upshaw Statement, supra note 29, at 105.
  \item \textsuperscript{93} Id. This argument is diminished in that expansion in each of the leagues has occurred more frequently over the past several seasons than it had in previous years (NFL—Carolina Panthers and Jacksonville Jaguars—1995; MLB—Colorado Rockies and Florida Marlins—1993; Phoenix Diamondbacks and Tampa Bay Devil Rays—1998; NHL—San Jose Sharks—1991; Ottawa Senators and Tampa Lightning—1992; Anaheim Mighty Ducks and Florida Panthers—1993; NBA—Miami Heat—1988; Minnesota Timberwolves and Orlando Magic—1989; Toronto Raptors and Vancouver Grizzlies—1995.). Dirk Patrick, Dollars Expand With Each New Team/Franchise Moves Might Be the Next Agent of Change, USA Today, Oct. 21, 1994, Sports at 10C.
  \item Despite expansion, teams still receive significant funds. The large franchise fee collected when a team enters a league, as high as $140 million in football, is divided among the existing owners, somewhat lessening the impact they will feel from the slightly decreased revenue share percentages. Id.
\end{itemize}
demned under the antitrust laws, while advocates of revenue sharing believe that the agreements are not anti-competitive.

III

Antitrust Law

Sections one and two of the Sherman Antitrust Act (Sherman Act) provide the basis for federal antitrust laws. Congress passed the Sherman Act as a deterrence to the creation of monopolies, which discourage economic competition by creating unreasonable restraints on trade.\(^{94}\) The antitrust laws are meant to encourage competition in the marketplace and to discourage anti-competitive conspiratorial practices among competitors.\(^{95}\)

There are two possible ways to show a violation of section 1 of the Sherman Act—a showing of per se illegality or a finding of a violation under the rule of reason test.

Fundamental to the per se rule is the rationale that the facts underlying certain conduct such as price fixing . . . division of markets . . . group boycotts, or concerted refusals to deal . . . and other “naked restraints of trade with no purpose except stifling of competition,” need not be examined on a case by case basis. These types of agreements or practices “because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal . . . .”\(^{96}\)

In addition, a per se violation will be found if the coercive conduct has a direct adverse effect on competition rather than simply an incidental effect.\(^{97}\)

Under the rule of reason test, however, the coercive conduct is examined on a case-by-case basis to determine if it was, in fact, anti-competitive and the plaintiff sustained injury to a relevant market.\(^{98}\) Therefore, under the rule of reason test, coercive conduct will withstand antitrust scrutiny if it is shown that the conduct was in fact pro-competitive.\(^{99}\)

Sports leagues have presented the courts with numerous problems in terms of applying the antitrust laws, and there has been a


\(^{95}\) Id.

\(^{96}\) Neeld v. NHL, 594 F.2d 1297, 1299 (9th Cir. 1979) (quoting White Motor Co. v. United States, 372 U.S. 253, 263 (1963); Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 15 (1958)).

\(^{97}\) Id. at 1300.

\(^{98}\) See Standard Oil Co. v. United States, 221 U.S. 1 (1911) (original formulation of the rule of reason test); Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918) (the classic approach to rule of reason analysis).

disparity in the treatment of the leagues. The Supreme Court granted baseball an exemption from the antitrust laws. Both the courts and Congress have been reluctant either to repeal the baseball exemption or extend it to other leagues. The Supreme Court has been reluctant to withdraw baseball’s exemption, even though the Court has stated that the reasoning of the original decision was flawed. The Court has stated that Justice Holmes’ original analysis of whether the business of baseball is interstate commerce is inadequate given the nature of the sport.

A. Baseball

Baseball’s current antitrust exemption dates back to 1922, when the Supreme Court declared in Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs that baseball was not interstate commerce and, therefore, not subject to the antitrust laws. Justice Holmes wrote for a unanimous Court, stating that the playing of a baseball game was not trade as the term was commonly used and the crossing of state lines was merely incidental to, and not the primary aspect of, the game. Consequently, baseball was deemed outside the scope of the Sherman Act.

Including the 1922 case, the Supreme Court has heard three baseball cases and two other sports cases dealing with antitrust exemption. In each of the baseball cases, the Supreme Court refused to overturn Federal Baseball despite the Court’s recognition that the Federal Baseball decision was analytically flawed. In Flood, the Court reasoned that since the business of baseball developed and expanded relying on the exemption granted to it in 1922, more harm would come from forcing baseball to completely restructure its established system than overruling a decision that no longer makes analytic sense. In the

101. See Toolson, 346 U.S. at 356; Flood, 407 U.S. at 258. The crossing of state lines to play games, and the broadcasting of games across the nation are a few examples of why baseball is in fact interstate commerce and therefore subject to regulation by Congress. Id. at 58 (Burton, J., dissenting).
102. 259 U.S. 200 (1922).
103. Id. at 209.
104. Id.
105. See Toolson, 346 U.S. at 356; Flood, 407 U.S. at 258.
other two cases, the Court refused to extend the exemption to football and basketball.\textsuperscript{107}

In \textit{Toolson v. New York Yankees, Inc.},\textsuperscript{108} the Court upheld \textit{Federal Baseball} "[s]o far as that decision determines that Congress had no intention of including the business of baseball within the scope of federal antitrust laws."\textsuperscript{109} In \textit{Flood v. Kuhn}, the Court again upheld the exemption for baseball stating that even though the exemption was illogical and an aberration confined to baseball, it was a matter for Congress to correct and not for the Court to address.\textsuperscript{110} In a recent case, however, the District Court in Florida has ruled that baseball's antitrust exemption applies only to the reserve system and not to all aspects of baseball.\textsuperscript{111} The validity of this argument has yet to be tested in a higher court, and it is therefore unclear how other courts will react to this argument.

Congress has considered the extension of the antitrust exemption to other sports; however, no such bill has ever passed both houses.\textsuperscript{112} At the present time, Congress is considering removing baseball's antitrust exemption by statute. Since the Supreme Court has refused to do so, Congress must act if baseball is to be brought in line with the other sports leagues.

\subsection*{B. Other Sports Leagues}

The three other major sports leagues do not share the same antitrust exemption that baseball currently enjoys, thereby leaving them subject to the antitrust laws.\textsuperscript{113} Baseball’s antitrust exemption has been tested by other leagues, but the Court has refused to extend the exemption. In \textit{Radovich v. National Football League}, a Clayton Act case, the Court stated:

\[\text{[s]ince Toolson and Federal Baseball are still cited as controlling authority in antitrust actions involving other fields of business, we now specifically limit the rule there established to the facts there involved, i.e., the business of organized professional baseball. As long as the Congress continues to acquiesce we should adhere to—but}\]


\textsuperscript{108} 346 U.S. 356 (1953).

\textsuperscript{109} \textit{id.} at 357.

\textsuperscript{110} Flood, 407 U.S. at 284.


\textsuperscript{112} See Radovich, 352 U.S. 445, 450 n.7; Flood, 407 U.S. at 281.

\textsuperscript{113} See Flood, 407 U.S. at 282-84.
not expand—the interpretation of the Act made in those cases. . . .

The Court stated that "[t]he volume of interstate business involved in organized professional football places it within the provisions of the Act." The Court stated that if radio and television transmissions are substantial, the commerce requirement of the Antitrust Act would be met. While this observation by the Court is directly in conflict with Justice Holmes' analysis in Federal Baseball, it is nevertheless a more accurate portrayal of the realities of sports. If the criteria for being subjected to the antitrust laws enacted by Congress is interstate commerce, sports leagues provide a perfect example of interstate commerce.

1. Characterization of Sports Leagues

How should the leagues be dealt with in terms of antitrust scrutiny? The characterization of sports leagues will determine the extent to which, if at all, the antitrust laws are applicable. Some commentators argue that sports leagues should be characterized as single entities. Single entities are not subject to the antitrust laws because a single entity cannot conspire against itself. Another approach would be to characterize sports leagues as joint ventures. Questionable agreements of joint ventures are subject to antitrust scrutiny under the rule of reason. The characterization of leagues as either single entities or joint ventures is often the key determinant in whether antitrust laws will apply to sports leagues in a given situation.

a. Sports Leagues as Single Entities

The Supreme Court has held that a parent corporation and its wholly owned subsidiary are considered a single actor and cannot conspire against itself; therefore, it is not subject to the same restrictions as independent actors that conspire to control the marketplace. Under the current system, a sports league is a single entity for purposes of certain contracts, but not for others. For example, teams join together to form agreements on the rules of the game, but are com-

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114. 352 U.S. at 451. See also Haywood, 401 U.S. at 1205 (stating that "Basketball . . . does not enjoy exemption from the antitrust law.").
115. Radovich, 352 U.S. at 452.
116. Id. at 435.
117. Van Glish, supra note 21, at 84.
121. Jacobs, supra note 32, at 31-32.
pletely independent for other contracts, such as player contracts and stadium leases.\(^{122}\) The courts have found, however, that professional sports leagues are not single entities for purposes of federal antitrust law, and, therefore, can be held liable for unreasonable restraint of trade.\(^{123}\) Even though the leagues do not have the single entity defense available to them, all joint agreements and restrictions placed on teams will not necessarily be considered violations of the antitrust laws.\(^{124}\) If agreements or restraints enhance competition rather than hinder competition, they will survive "section 1 scrutiny under the rule of reason test."\(^{125}\)

Even though courts have found that sports leagues are not single entities, they have conceded that they are unique economic forms.\(^{126}\) "The NFL is a unique business organization to which it is difficult to apply antitrust rules which were developed in the context of arrangements between actual competitors . . . . We believe antitrust principles are sufficiently flexible to account for the NFL's structure."\(^{127}\) If a sports league is not treated as a single entity, another option would be to characterize the league as a joint venture.

b. Sports Leagues as Joint Ventures

A joint venture is the combination of a number of single business entities which join together and form an alliance through agreements for the purpose of producing a particular product. Some courts have found that sports leagues are joint ventures, while others have found that a sports league is neither a pure single entity, nor a pure joint venture.\(^{128}\) In 1991, the United States District Court for the Northern District of Illinois found in \textit{Chicago Professional Sports Ltd. Partnership v. NBA}\(^{129}\) (\textit{Chicago Bulls}) that sports leagues are considered to be hybrids of joint ventures and single entities: entities which are not quite joint ventures and not quite single entities, and which, therefore, are subject to the rule of reason test.\(^{130}\) The court found that in spite of the

\(^{122}\) Chicago Prof. Sports Ltd. Partnership v. NBA, 961 F.2d 667, 672 (7th Cir. 1992).
\(^{123}\) See \textit{Los Angeles Memorial Coliseum Comm'n v. NFL}, 726 F.2d 1381, 1386-90 (9th Cir. 1984), cert. denied, 469 U.S. 990 (1984). The courts decided in this manner because the restraints could hinder competition between teams.
\(^{124}\) Van Glish, \textit{supra} note 21, at 92.
\(^{125}\) \textit{Id.}
\(^{126}\) \textit{Los Angeles Coliseum Comm'n}, 726 F.2d at 1387-90.
\(^{127}\) \textit{Id.} at 1401.
\(^{128}\) Jacobs, \textit{supra} note 32, at 31-32; \textit{Chicago Prof. Sports Ltd. Partnership}, 961 F.2d at 672.
\(^{130}\) \textit{Id.} at 1340.
substantial economic collaboration among the teams, the NBA is only a partially integrated venture. The level of contractual integration among the teams lies somewhere between what would be tolerated under the antitrust laws among wholly separate firms, on the one hand, and what one would expect from a fully merged or integrated firm on the other.  

In 1992, the Seventh Circuit affirmed the District Court's opinion. It appears from court rulings that the characterization of a sports team will depend on the nature of the agreement in question. If the agreement relates strictly to the rules of the game or a similar matter, the league is generally considered a single entity without antitrust implications; however, if the agreement is more economic in nature, and that agreement shows an anti-competitive effect and injury to a relevant market, the single entity defense breaks down and the league is subject to the antitrust laws. The nature of a sports league does not lend itself to being characterized as a single entity because a league has characteristics of both a single entity and a joint venture; however, there should be more consistency among the courts in defining situations in which leagues will be considered joint ventures or single entities.

IV Possible Solutions to the Merchandising Dilemma

With merchandise sales accounting for nearly $3 billion dollars per year in revenue for each of the four major sports leagues, a uniform system for handling licensing contracts within each league has become more important. Using history as a guide, there are two likely scenarios for the future: (1) Congress will get involved and pass a law similar to the Sports Broadcasting Act (SBA), or (2) the joint merchandising agreements will be dissolved and, in effect, lead to the diminution of the leagues as they exist today. Before either scenario becomes reality, problems inherent with each situation will need to be addressed. In lieu of adopting either of the extreme positions, there is a median scenario that would benefit all the parties: the licensing arm of each league could handle the merchandise licensing and collect the royalty revenue for equal distribution among the clubs as they currently do, but at the same time, each team could be allowed to market its own logo, placing a percentage of the extra revenue in the shared revenue pool and retaining the rest.

131. Id.
132. Chicago Prof. Sports Ltd. Partnership v. NBA, 961 F.2d 667 (7th Cir. 1992) (finding that the league restrictions on the number of games that could be telecast on superstations was a violation of the antitrust laws under the rule of reason test).
A. Congressional Intervention

If Congress were to intervene and essentially create an antitrust exemption for merchandise licensing, it would most likely utilize the SBA as a model. The SBA created an antitrust exemption allowing each of the four major leagues to negotiate national network broadcasting contracts for each league as a single entity.\(^{133}\)

1. Sports Broadcasting Act (SBA)

In 1961 Congress passed the SBA, which allowed the four major sports leagues the right to act as four individual cartels and sell the television rights for their league in a single package.\(^{134}\) The SBA allows each league to negotiate a national television contract as a single entity without being subject to judicial scrutiny under the antitrust laws.\(^{135}\) Congress enacted the SBA with the intention of assisting smaller-market teams, who did not have the bargaining power to negotiate their own television contracts, as well as enhancing the efficiency of sports leagues by allowing them to bargain as a single unit and negotiate a television rights deal that would benefit all parties.\(^{136}\) Congress determined that the networks would also benefit because they would receive increased revenues from higher fees collected from sponsors if they could negotiate one deal that presented various scheduling options as opposed to only catering to the large market areas.\(^{137}\)

If each franchise were left to shift for its financial and marketing self in the matter of television... the ensuing division into rich and poor would give a few big market franchises enormous advantages as television grew. This would cause a corresponding imbalance on the field, greatly lessening the marketability of the product created by the league as a whole. That kind of situation would only cost everybody money in the long run.\(^{138}\)

When Congress passed the SBA, it stated that the Act was intended to provide "the weaker clubs of the league [with] continuing television income... on a basis of substantial equality with the stronger clubs."\(^{139}\) Congress stated that preserving competitive balance ultimately serves the public interest because if there is not competitive and geographic balance among the teams, "[i]he leagues and their

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134. ZIMBALIST, supra note 16, at 151.
135. Van Glish, supra note 21, at 98.
136. Id.
137. Id.
138. HARRIS, supra note 28, at 14.
139. Rozelle Statement, supra note 74, at 61.
weak teams are unable to attract and hold the public interest which is necessary for their survival.\textsuperscript{140}

The SBA, however, does not create a blanket exemption for all television contracts; it only protects the league from antitrust scrutiny if the contract was negotiated by the league on behalf of all the teams.\textsuperscript{141} There have been instances in which the league has undergone antitrust scrutiny for imposing restrictions on individual team television contracts because the action by the league was not part of a negotiated contract, but, rather, was an imposition of restrictions on an individual team’s ability to negotiate its own contract.\textsuperscript{142} There are a number of alternative ways in which the SBA could have been written which would have reduced the antitrust litigation centered around the SBA. If the SBA is to be used as a model for future legislation, these concerns must be addressed.

2. Merchandising Legislation Expanding on the SBA Model

If Congress takes action, the SBA should be used as a starting point; however, changes should be made. For example, the SBA states that it covers only those rights that are national and negotiated by the league as a whole.\textsuperscript{143} An interesting question arises in relation to superstation telecasts of games because they can reach the entire nation, yet the contracts are negotiated by individual teams. A local team’s television market may be infringed upon because of a “superstation” telecast. Yet, since it is not a national league contract, the SBA does not offer recourse.

The “superstation” problem arises in the merchandising context when corporations like Disney own sports teams and have the resources to sell licensed merchandise in stores all over the world, as opposed to selling only in their geographic area. A possible solution would be to specifically include or exclude individual team national contracts from antitrust scrutiny. If the Act were to exclude such contracts, the league would not be able to impose restrictions on the area in which merchandise may be sold. Otherwise, such a rule would be subject to antitrust scrutiny and would probably suffer the same fate as the NBA’s rule in \textit{Chicago Bulls}. If the legislation were to include individual team national contracts, the league would be able to impose restrictions and remain immune from antitrust scrutiny.

\begin{itemize}
\item \textsuperscript{140} Id. at 62.
\item \textsuperscript{141} Van Glish, supra note 21, at 99.
\item \textsuperscript{142} See \textit{Chicago Prof. Sports Ltd. Partnership v. NBA}, 961 F.2d 667 (7th Cir. 1992).
\end{itemize}
In the merchandising context, if the legislation aims to cover not only the contracts negotiated as a league but also those outside of a certain geographic radius from the home arena of the sports club, the league may be able to set more rigid rules to avoid the analogous superstation problem and not be subject to antitrust scrutiny.

When drafting the merchandising legislation, Congress would need to take all these factors into account in order to avoid further antitrust litigation down the road.

**B. Dissolution of Joint Agreements**

Another potential future for merchandise licensing would be the dissolution of joint licensing agreements. In this case, each team would be left to negotiate its own merchandise licensing contract rather than have the league handle the negotiations. Teams in large markets would benefit the most because they would have the resources and the bargaining power to negotiate lucrative merchandising deals. Teams in smaller markets would have to put resources they do not have into marketing their team. It would be difficult for smaller market clubs with weak competitive teams to obtain licensing deals with manufacturers because many manufacturers would be unwilling to take risks on teams having difficulty generating a sufficient fan base to purchase merchandise with the team logo.

**1. Merchandise Licensing Upheaval in the NFL**

Jerry Jones, the owner of the Dallas Cowboys, has stated that he intends to reclaim the rights to the Cowboys logo when the NFL Trust expires after the 2003 season. Jones believes that each team should be allowed to market its own logo and retain a larger portion of the profits for itself. In 1994, merchandise bearing the Cowboys logo accounted for 24.3% of total merchandise revenue, and Jones believes that he is entitled to what he feels is his fair share rather than split the royalties evenly with the 29 other teams in the league. Jones believes that each individual team would be able to market its own merchandise more effectively than the league cur-

144. As of publication, the NFL has filed suit against Jerry Jones, and he has countersued. Rights to merchandising revenues is one of the main issues in contention.
145. The NFL Trust was created by the teams when the NFLP was formed in 1963 and renewed in 1983. Each team signs an agreement which gives the NFLP the exclusive right to a team’s trademark and logo. Rick Gosselin, *Jones Sets His Sights on 2004; Cowboy Owner Seeks Trademark*, DALLAS MORNING STAR, Aug. 16, 1995, Sports Day, at 1B.
146. Id.
rently does because each team knows its individual market better than the central league office. However, the popularity of one team is due to its success on the field against other teams; in order for competition to exist, other teams must exist and they must be competitive. Art Modell, owner of the Cleveland Browns, disagrees with Jones and believes that the logo merchandise sells because it is symbolic of the competition between the teams rather than one team’s success.

A team’s marketing success will depend on any combination of three factors: (1) success in the league, (2) a strong logo, or (3) colors that are in high demand. Even though a team may know its own market better than the league licensing agent, a team on top does not remain on top forever. The cyclical nature of sports allows for one team to be good for a while; however, the high rate of player and coaching staff turnover essentially assures that one team will not remain on top forever. Because of this cyclical nature, entrusting a licensing program solely to each individual team could ultimately be disastrous for some teams.

The Colorado Rockies, Anaheim Ducks, and San Jose Sharks are all examples of success due to the second two factors. When the Sharks and Rockies entered their leagues, hockey and baseball respectively, they were among the national leaders in sales despite having mediocre first seasons. The Rockies and the Sharks were immediately successful in merchandise sales because of their uniform colors, purple and teal, respectively (the Ducks’ ability to sell merchandise can be attributed to their logo and the marketing skills of the Disney corporation). Each of these factors plays an important role in the successful marketing of a team; however, each requires a large amount of human and monetary resources, something that many smaller market teams do not possess. Shared licensing revenue provides an important source for this much needed capital.

If Jones persists and succeeds in dismantling the joint licensing program, the consequences for some teams would be extremely grave. Ultimately, this could lead to a decrease in the number of teams in the league, because those teams in smaller markets that rely on shared revenue would be forced to stop operations due to a lack of financial

149. Michael Hiestand, Jones Wants to See Merchandise Profits, USA TODAY, Sept. 20, 1994, at 1C.
150. Id.
151. Mark Albright, In Merchandise Sales, The Bucs Stop Here, ST. PETERSBURG TIMES, Sept. 18, 1994, at 1H.
152. Id.
153. Id.
154. Zgoda, supra note 59, at 12C.
resources. Jones states that he is not anti-revenue sharing and that he only wants to retain this small portion of the revenue pie.\textsuperscript{155} However, if the successful revenue sharing that is currently in place begins to be dismantled piece-by-piece, a trend towards the dissolution of revenue sharing may be started. If Jones takes this one small portion of revenue from the revenue sharing pie, what is to keep him or another owner from removing another piece of the revenue sharing pie? Ed DeBartolo Jr., owner of the San Francisco 49ers, stated, “[i]f we let the mavericks go out on their own, they’ll destroy the league . . . . Down the road the league will die.”\textsuperscript{156}

Since revenue sharing is essential to the survival of smaller market teams, and the joint licensing agreements supply, and will continue to supply, a significant amount of money to certain team revenues, it is important to maintain the collective agreements.

C. Potential Solution

One possible solution to the merchandising dilemma would be for leagues to jointly license the merchandise for sale on a national and international scale and then allow each team to market their own logo at a local level. The NHL has a similar practice; however, unlike the NHL, a standard fee should be imposed rather than specifying a certain area in which the merchandise can be sold. Also, individual teams should not be allowed to strike their own deals with the league, as was the case with the powerful Disney Corporation. The league could then charge a supplemental fee on those extra sales which would be added to the distribution pool. This practice would supplement the revenue income of the league and reward those teams whose merchandise sells well, due to either effective marketing by management or by simply having a good, competitive team, while not abandoning those teams that depend on the additional revenue. This is analogous to the superstation revenues generated by teams outside of the national network contracts. However, unlike the scenario in \textit{Chicago Bulls}, where the league restricted the number of games instead of placing a restriction on the area in which a team licenses its merchandise, the league would simply impose a fee on the revenue obtained by those clubs on sales outside the national contract.

MLB handles its superstation contracts in a similar manner. There is a fee charged on the revenue received from superstation contracts rather than a restriction on the number of games that can be

\textsuperscript{155} Gosselin, supra note 145, at 1B.
televised on a superstation. Even though this practice is not subject to antitrust scrutiny due to baseball's current antitrust exemption, the practice in the merchandising context in other sports leagues could possibly withstand antitrust scrutiny under the rule of reason test. It could be argued that the practice is not anti-competitive, but rather pro-competitive. Such a practice would be pro-competitive because, despite the league's primary control over the licensing and marketing of team logos, it would still allow each team to handle some marketing on its own. There would not be restrictions diminishing the competitiveness between the teams to actively market and promote individual teams; and there would be enhanced competition, both on the playing field because of increased team revenues, as well as between the individual teams in terms of marketing and selling team merchandise.

By imposing a fee on additional revenue, all teams would benefit. The team whose merchandise sells well will benefit from the team's success on the field or its superior marketing ability. In addition, all teams will benefit from total increased revenue because the shared revenue going to the weaker teams, whose poor on-field performances adversely affect their merchandise sales, will ultimately make the league stronger and more entertaining for the viewing public.

V

Conclusion

The increase in sports merchandise sales has raised the question of whether the current system for licensing team merchandise is indeed the most effective system. The joint agreements that are integral to the functioning of a sports league are the best way to handle the merchandising of team logos. The revenue generated by merchandise sales is an important element in maintaining a competitive league because it provides teams that do not have a sufficient revenue base with the added revenue needed to field a competitive team. Competition is the heart of sports leagues. Without competition, the appeal of a sports league is lost.

157. ZIMBALIST, supra note 16, at 50.